

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

NETLIST, INC., (CAUSE NO. 2:21-CV-463-JRG
)
Plaintiff, ()
vs. ()
SAMSUNG ELECTRONICS CO., LTD., ()
et al., () MARSHALL, TEXAS
(JANUARY 19, 2023
Defendants.) 1:30 P.M.

MOTION HEARING

BEFORE THE HONORABLE RODNEY GILSTRAP
UNITED STATES CHIEF DISTRICT JUDGE

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1 THE COURT: Be seated, please.

2 This is the time set for various pending motions before
3 the Court in the Netlist versus Samsung, et al., matter. This
4 is Civil Case No. 2:21-CV-463.

5 The Court will call for announcements at this time.

6 What says the Plaintiff Netlist?

7 MR. BAXTER: Good afternoon, Your Honor. Sam Baxter
8 from McKool Smith and Jason Sheasby from Irell. And we are
9 ready, Your Honor.

10 THE COURT: Thank you.

11 What's the announcement from the Defendants?

12 MS. SMITH: Good afternoon, Your Honor. Melissa
13 Smith on behalf of Samsung. I'm joined by Mr. Ruffin Cordell,
14 Dr. Frank Albert, Ms. Lauren Degnan, and Your Honor we also
15 have a client representative in the courtroom today
16 Mr. Michael Nguyen. And Your Honor, Samsung's ready to
17 proceed.

18 THE COURT: All right. Thank you.

19 I'll note for the record that there are approximately
20 eight motions that have built up on the Court's docket over
21 the last period of time that need to be resolved so the case
22 can be put in a posture to move forward toward its current
23 trial setting in May. The Court ordered the parties to appear
24 this morning by 9:00 and meet and confer on these various
25 pending motions in an effort to hopefully resolve some, if not

1 all of them, and the parties did appear, they met and
2 conferred here beginning at 9:00 a.m. I'm advised that three
3 of these matters have been resolved by an agreement of the
4 parties, and I want to get an announcement on the record from
5 the parties as to the substance of those agreements, and then
6 we'll proceed to take up the remaining matters that were not
7 resolved through the parties' meet and confer efforts.

8 I'm happy to hear from either party with the other one
9 confirming the recitation, but who's prepared to give me a
10 recitation on the record as to the three motions that have
11 been resolved?

12 MR. SHEASBY: With your Court's permission I will do
13 it. Jason Sheasby.

14 THE COURT: Why don't you go to the podium and do
15 that, Mr. Sheasby.

16 And Mr. Cordell, I will let you tell me if that's
17 accurate or not.

18 MR. SHEASBY: So the first one that will be resolved
19 is Docket No. 113, and the resolution on Docket 113 will be
20 that Samsung will have an extra two weeks to add any
21 additional arguments it needs to in its expert reports for the
22 4H HBM products beyond those that are applicable to the 8H HBM
23 products.

24 THE COURT: Is that correct, Mr. Cordell?

25 MR. CORDELL: Yes, Your Honor.

1 THE COURT: All right. The Court will accept that
2 agreement and order the motion resolved in that manner.

3 I believe the Document No. 124 is next, Mr. Sheasby.
4 What's the agreement there?

5 MR. SHEASBY: Yes. So on Document No. 124, the
6 following depositions will be produced from the ITC
7 proceedings--Doctor Lee, C.K. Hong, Gail Sasaki, Mr. Milton,
8 and J.B. Kim. If Samsung introduces those depositions at
9 trial, Netlist will have the right to counterdesignate.

10 THE COURT: All right. What's Defendant say about
11 that recitation?

12 MR. CORDELL: That's correct, Your Honor.

13 THE COURT: Okay. Then I'll accept the parties'
14 agreement and order the agreement carried out as a result of
15 that motion.

16 And I believe Document 125 is also resolved. Is that
17 correct?

18 MR. SHEASBY: That's correct, Your Honor. Samsung
19 has represented that the SSI data that was produced to is end
20 sale SSI data. For the purposes of doing a cross check on the
21 transfer pricing, they will produce the -- for one DDR4 LRDIMM
22 product, 1 DDR5 product, and one HBM product, the end-sale
23 pricing for two of Taiwan, Shanghai, or EU subsidiaries.

24 THE COURT: Taiwan, Shanghai, or what?

25 MR. SHEASBY: EU subsidiaries.

1 THE COURT: Okay.

2 MR. SHEASBY: Based on what's most feasible for
3 them.

4 THE COURT: What's Samsung say to that recitation?

5 MR. CORDELL: Mr. Sheasby is almost correct. I
6 think it was Singapore rather than Shanghai.

7 MR. SHEASBY: Yes, but you -- I thought you said --

8 MS. DEGNAN: Mr. Sheasby is correct. It is Shanghai
9 and the spreadsheet on Singapore.

10 MR. SHEASBY: Shanghai. Okay.

11 THE COURT: So with some discussion, the original
12 recitation is correct?

13 MR. SHEASBY: Yes, Your Honor.

14 THE COURT: I'll accept the parties' resolution and
15 order those agreements carried out.

16 Okay. That leaves us the balance of what was set
17 unresolved and we'll proceed to take those matters up.

18 Let's begin with Samsung's motion to stay pending IPR
19 review and the Ninth Circuit appeal, and I see no reason why
20 that shouldn't be coupled with Samsung's unopposed motion for
21 leave to file a supplement to the pending motion to stay
22 pending the Ninth Circuit appeal and the IPR review. I
23 believe this second motion was filed after the institution
24 decision was announced in December, and I'm sure it just
25 relates to that, but these two seem related so we'll hear them

1 both at the same time.

2 MR. CORDELL: Thank you, Your Honor.

3 May I approach?

4 THE COURT: Please.

5 All right, counsel. Go ahead.

6 MR. CORDELL: Thank you, Your Honor.

7 It's Ruffin Cordell on behalf of Samsung, and we are
8 here to ask the Court to stay this matter for two important
9 reasons. The Ninth Circuit is considering an appeal from a
10 Central District of California case wherein Netlist
11 successfully sought and obtained judgment that the -- an
12 agreement between the two parties, the 2015 JDLA was
13 terminated, and as a result of that termination the license
14 that Samsung enjoyed to all of Netlist's patents, including
15 the patents-in-suit, was terminated. We believe that that was
16 improper. We've got an appeal pending. It's fully briefed.
17 We expect to get an order setting argument any day now, and
18 that it will be resolved in the near future.

19 THE COURT: Let me ask you this. Wasn't there an
20 action, a declaratory judgment action filed by Samsung in the
21 District of Delaware that dovetails with this issue in the
22 Central District of California, and you, as I understand it,
23 have not moved the Delaware court to stay that proceeding?
24 What's the interaction of these two matters?

25 MR. CORDELL: Thank you, Your Honor.

1 We have not moved, but we've made it very clear that if
2 this court stays, we will immediately seek a stay of the
3 Delaware action. So we believe all actions should be stayed
4 pending resolution by the Ninth Circuit.

5 I'm about to go into the *Landis* factors, but what we're
6 really talking about here is the comety--I have a hard time
7 with that word--between sister courts. And we believe that
8 the judgment of the Central District of California was
9 incorrect. We think that that license agreement should
10 remain, we think that it's in tact, and that really there
11 are -- there can be no patent litigation issues in any court
12 because we believe that agreement is in tact.

13 THE COURT: What's your position on the IPRs?

14 MR. CORDELL: The IPRs we believe is a second reason
15 for stay. Four of the six patents are subject now to
16 instituted IPRs. We will get decisions on the last two on
17 April 19. We've seen other similar IPRs that cover
18 essentially the same claims and certainly the same issues, and
19 they've not only been instituted, but they have been
20 successful. We've seen the Patent Office actually invalidate
21 those claims.

22 So we feel like this is a unique case in that we have
23 both the comety considerations of our sister court in
24 California coupled with four of the six instituted IPRs, and
25 we expect the two additional ones, providing the Court with

1 really a real basis to stay this case.

2 THE COURT: So if I understand it, this case is set
3 for trial on the 1st of May of this year. These last two
4 institution decisions won't happen until the latter part of
5 April. If they are instituted on, we're talking about a year
6 from April of '23, which is effectively almost another --
7 almost a year from the trial date that we're looking at now.
8 Is that correct?

9 MR. CORDELL: That is correct, Your Honor. There
10 is --

11 THE COURT: Plus the appeals to the Federal Circuit
12 and all the other related things that will flow from that
13 process.

14 MR. CORDELL: One of the things that I would like
15 to address at some point is that there is a distinction within
16 the IPRs. There are really two cases before Your Honor. One
17 has to do with DDR4 and DDR5 DIMMs--dual inline memory
18 modules; and the other has to do with what are called high
19 bandwidth or HBM products. They are really two distinct
20 cases. The original case and the original four patents that
21 we have the instituted IPRs on is really *sui generis*. We had
22 patents applied to those products alone. Those have been
23 instituted.

24 The second part of this case, which was filed roughly
25 five months after the original case, relates to two additional

1 patents that Netlist brought on these HBM products. It's a
2 distinct set of patents. It's a distinct set of products.

3 So one of the proposals we made was a partial stay; that
4 we stay the first four patents and reserve that for later
5 judgment. And to the extent the Court feels like we need to
6 proceed now, we can proceed on the HBM products. And that
7 would drastically simplify the case, it would cut down on the
8 confusion that this jury is going to have to face in keeping
9 these terrible acronyms straight where we have LR4, LR5 DIMM
10 versus HBM products. And I think it would -- it actually
11 would be a rational way to try the case. And we do have
12 instituted IPRs on those four, and have had them now for
13 several months.

14 THE COURT: Well, we had two earlier in 2022 and
15 then the last two were in December of 2022. Correct?

16 MR. CORDELL: Correct.

17 THE COURT: The institutions.

18 MR. CORDELL: Right.

19 There is a legal issue that we're jostling with between
20 the parties, Your Honor, and it's this. There are two
21 competing regimes under which courts consider stays. We point
22 to the *Landis* factors, which is an old Supreme Court case that
23 talks about the interrelationship between sister courts.
24 Netlist, on the other hand, looks at this *Incan* (ph) case
25 which really relates to a stay of an ongoing case when this

1 court makes a decision about its own case; really a stay
2 pending appeal in a single district court. That, to us at
3 least, is a completely separate line and it's not really
4 appropriate here.

5 What we're talking about here is the *Landis* analysis, and
6 it's been recognized by Your Honor in the *Lochner Techs* case
7 from a few years ago where we're looking at the impact of a
8 sister court's decision on the issues we have to decide. And
9 it's profound here, because if that license is upheld out in
10 California, there is no lawsuit here, not on any of these
11 patents.

12 THE COURT: Well, that's my question. Are you
13 telling me that there's nothing before the Court in this case
14 that's not covered by the JDLA?

15 MR. CORDELL: Correct.

16 THE COURT: Okay.

17 MR. CORDELL: So if we are successful, the JDLA did
18 two things. Well, it did a number of things, but it set up a
19 joint development between the two parties, but critically, it
20 was a full cross license of all parties' patents. And I have
21 it here. I can walk Your Honor through it. In Section 8 of
22 the JDLA, the parties exchanged a grant to all of their
23 patents and in perpetual licenses. And you can see it right
24 in the language of the document. The license is in Section
25 8.2, and it licensed to Samsung all of Netlist's patents for

1 all of Samsung's licensed products. Licensed products was
2 defined as all semiconductor products manufactured or have
3 manufactured by or for Samsung, excluding foundry products.
4 That's when they're making products for another company, and
5 that's not really at issue here. That's distinct from the
6 developed product, which was the joint development product
7 that the parties had contemplated.

8 So there's no question that if we win that Ninth Circuit
9 appeal, we are back here with a complete defense, complete
10 defense to all of the claims in this case.

11 Now, in the brief that Netlist filed 10 days ago, 20 days
12 ago, right after the new year, they for the first time said,
13 Well, maybe it doesn't resolve everything; maybe Samsung
14 wasn't really licensed to all of Netlist's patents. But Your
15 Honor, we don't believe that's true. So I have --

16 THE COURT: There's not a dispute about the foundry
17 products as still being live before this Court,
18 notwithstanding what the Ninth Circuit might do?

19 MR. CORDELL: So I don't think so. I'll certainly
20 hear from Mr. Sheasby about that, but I think the foundry
21 products are really not accused in this case. So foundry
22 products is a special class of products where Samsung acts as
23 a manufacturer for some other company as opposed to
24 manufacturing the memory products that are actually accused in
25 this case. So I don't think it's going to be an issue.

1 And there's just no question that Netlist over and over
2 and over again has announced to the world that 2015 JDLA
3 licensed Samsung. They told the ITC about it in 2017, they
4 needed to make representations about other parties who were
5 licensed to make these LRD DIMMs or RDIMMs. And they told the
6 ITC in a submission on the public interest that they had to
7 put -- that, in fact, Samsung had full cross license.

8 They told the Court in California, they told them over
9 and over again, they drew a distinction between the
10 limitations in the JDLA that were confined to the jointly
11 developed products--which is, for example, I have up on slide
12 12 Section 6.2--versus the broad grants out of Section 8 that
13 weren't limited to any particular product. It was all
14 Samsung's products. And they relied on that. They resisted
15 undisputed facts by saying, Well, they will dispute this if it
16 suggests that Samsung was -- that their patent license was
17 somehow limited. They took the affirmative position that
18 Samsung's license was not limited to any joint research and
19 development product, and that's what the court ruled on.

20 So I have up on slide 14 the Central District's order
21 saying, in fact, holding, in fact, that Section 8's
22 intellectual property licenses were unrestricted to the joint
23 developed product, or it's called the NVDIMM-P development
24 product.

25 THE COURT: Can you enlighten me as to why you went

1 forward with your motion to stay here but you didn't go
2 forward with your motion to stay in Delaware? I know you say
3 if it's granted here you'll immediately move in Delaware, but
4 is there some difference between these two districts that you
5 would move for it here but not move for it there?

6 MR. CORDELL: Certainly the pace of this litigation
7 is more rapid than what is happening in Delaware, but the
8 short answer is I don't have an answer beyond that. I haven't
9 thought it through, other than we have committed in writing in
10 our papers to seek a stay immediately if this case is stayed.

11 THE COURT: All right. Thank you, counsel.

12 Let me hear a response from Plaintiff, please.

13 MR. SHEASBY: Madam Courtroom Deputy, could I have
14 the elmo?

15 On October 14th, 2021, the Central District of
16 California granted summary judgment of no license. The next
17 day Samsung filed a declaratory judgment action in Delaware
18 seeking a declaration that a group of patents were not
19 infringed. Samsung then attempted to move all the Eastern
20 District of Texas patents into this Delaware action. Judge
21 Andrews rejected it. At no point in time was there a
22 discussion of stay. At no point in time was there a statement
23 that the comety between the Central District of California and
24 Judge Andrews' court was compromised by progressing with the
25 suit.

1 And, indeed, the argument of comety is -- has it
2 backwards, which is comety would argue in favor of this court
3 continuing with this lawsuit because the judge in the Central
4 District of California has twice on the papers rejected the
5 argument that the case that the license actually exists.

6 So that's the first issue I think that definitively
7 resolves the Ninth Circuit issue.

8 There's the second issue which is to say what happens if
9 the Ninth Circuit were to resolve the case and reverse it and
10 send it back to the judge, Judge Scarsi in the Central
11 District of California. Well, there are sort of two
12 challenges with that which is, one, that still doesn't mean
13 that Samsung has a license--there is just a live dispute as to
14 whether Samsung has the license.

15 Two, for -- there is two levels of dispute regarding what
16 the scope of the license is. One is my brother pointed out
17 that the license doesn't apply to foundry products, and, of
18 course, I understand that he is going to argue that none of
19 the products at issue are, quote, foundry products. But that
20 was an affirmative defense that they have the burden on, and I
21 certainly -- I saw no expert report on them establishing that
22 the accused products were non-foundry products or doing any of
23 the technical analysis that was due at the first round of
24 expert reports. And so it's not clear to me how they would
25 even carry their burden on that issue at this a late stage in

1 time. In other words, I don't believe that they have the
2 ability to make out a license defense at this point because
3 they haven't done the analysis as to the foundry issue.

4 The third issue is that there is actually one court that
5 has definitively decided the issue of the scope of this cross
6 license, and this is an administrative court in the Republic
7 of Korea. And the Republic of Korea -- and I put it together
8 so you can see it in context. The Republic of Korea has
9 definitively rejected any suggestion that this license
10 agreement, the scope of the license extends beyond the joint
11 development projects that they were referencing. We've
12 analyzed this in our expert reports in order to be in a nexus
13 of caution. And it wasn't just once--the Republic of Korea
14 has repeatedly found that this license grant is limited.

15 And so even if the Ninth Circuit were to do something,
16 which they are highly unlikely to do, which is to rule *sua*
17 *sponte* that Samsung's license is in place, that would not
18 resolve anything; all it would do is lead to a fight that
19 needs to happen. And this is the court to have that fight
20 about what the scope is of that cross license. But like I
21 said, that's impossible because they haven't presented any
22 evidence in their expert reports to support that.

23 THE COURT: You're saying that the Ninth Circuit,
24 even if they reversed the summary judgment ruling by the
25 Central District of California, the issue would then go back

1 to the trial court to be resolved?

2 MR. SHEASBY: Yeah. There would just be a fight
3 about --

4 THE COURT: On a non-summary basis.

5 MR. SHEASBY: On a non-summary basis. There would
6 be three fights. There would be a fight about whether the
7 license agreement has been terminated properly, there would be
8 a fight about whether the products at issue in this case are
9 foundry products, and there would be a fight in this case as
10 to whether the license granted existed extended beyond the
11 joint development program or during the period of the joint
12 development. And two of those issues, if they're lodged
13 anyway -- are lodged anywhere, they're lodged before this
14 court definitively.

15 THE COURT: What's your position on Samsung's
16 request vis-a-vis the IPR?

17 MR. SHEASBY: Yeah. So this is something that I
18 struggle with. There's been a regime change at the PTAB.
19 It's neither bad nor good, but it's objectively obvious, is
20 that Director Vidal has instructed for there to be highly,
21 highly aggressive examination of patents that are in
22 litigation. And so the challenge is that in an environment in
23 which the frequency of initiation is becoming exceedingly
24 high, in effect, my counsel, my brother counsel is proposing a
25 structure that would have this court stay essentially all its

1 cases while the PTAB rules.

2 There are two conflating factors that I think make this
3 particularly inappropriate. So this is not a case where it's
4 all about just money damages. Netlist is an operating entity.
5 Netlist makes products. They make products which compete with
6 Samsung. There are products that are not standard essential
7 products at issue in this case. These are patents that we
8 have never licensed and we've never offered to license just
9 for money. And so there is a real potential for an injunction
10 to be requested, at least as to some of these products. And
11 so time is definitely of the essence in this case. And by the
12 way, I say that with dual --

13 THE COURT: Slow down, Mr. Sheasby, please.

14 MR. SHEASBY: I say that with dual recognition of
15 this Court's jaundiced view of the appropriateness of
16 injunctive resolution, but I do think this is a case where at
17 least having this opportunity is important. It's obviously
18 important to Netlist's business for this to be resolved as
19 soon as possible.

20 The idea of splitting up the cases and doing judicial
21 surgery is not something that's really feasible. We need to
22 have one trial. It's highly, highly efficient to split these
23 into two trials. I note that they told Judge Andrews that all
24 of this plus all of this could all be in front of one trial,
25 and so the suggestion that only a subset of that is unfeasible

1 for a jury I don't think is reasonable.

2 I should also say that there are unique factors on the
3 final two IPRs that I think can make it highly unlikely they
4 will be initiated. The reason for that is because they were
5 advanced under a construction that was very, very broad. At
6 Samsung's request, Judge Payne issued a narrow construction
7 based on a disclaimer, and these IPRs are facially defective
8 by not involving that narrow disclaimer.

9 So if you were going to do some type of prudential
10 analysis, you would say it's unlikely that these two IPRs, if
11 they're even initiated, would get resolved. And as you see,
12 we're talking about late into 2024 before we get to even first
13 instance resolutions. And, you know, justice delayed is
14 justice denied.

15 With that, Your Honor, I'll rest on the papers.

16 THE COURT: All right. We've got a lot of ground to
17 cover, but if you have anything by way of very short rebuttal
18 that's just not pure reiteration, I'm happy to hear it,
19 Mr. Cordell.

20 MR. CORDELL: Thank you, Your Honor.

21 Can I have slide 15?

22 So let me just address the Korean -- the Korean Tax
23 Authority issued an opinion in a proceeding brought by Netlist
24 to which Samsung was not a party, not privy to, not informed
25 of. This was all something done within Korea, and the issues

1 there are completely different. So this court typically
2 doesn't accept statements that are made back and forth in
3 cases even between these parties, and absolutely shouldn't
4 here where we had absolutely no involvement with it
5 whatsoever.

6 As to what would happen if the Ninth Circuit reverses, I
7 take issue with Mr. Sheasby because it's not a case where we
8 have to go back and prove entitlement to the license. If the
9 Ninth Circuit reverses, the license is restored. We are back
10 licensed to these patents. And that has two impacts. The
11 substantive impact, because now we have a defense to all his
12 infringement claims --

13 THE COURT: Well, let me stop you. Are you telling
14 me that somehow you're privy to what the Ninth Circuit's
15 opinion is going to say? I've read a lot of appellate
16 decision that told me to do things I didn't anticipate they
17 were going to tell me to do. I mean, clearly they could
18 affirm, they can reverse and remand, or they can reverse and
19 render. If they don't reverse and render, then I don't think
20 you immediately have the golden key of a license that you can
21 run to the Court with.

22 MR. CORDELL: Well, they could vacate. They could
23 vacate and remand. That's certainly a possibility.

24 THE COURT: And give instructions to proceed
25 consistent with our opinion above, which then the poor judge

1 in California's got figure out what the heck that means.

2 MR. CORDELL: Well, and certainly there are
3 permutations that wouldn't be in my favor. I could lose. And
4 if I lose, well, then I have no license. But if they do any
5 of the other options, if they merely vacate, we are now
6 restored to the status ante, and we would go back and be in
7 possession of the license that we were in before the judgment
8 was entered.

9 THE COURT: Well --

10 MR. CORDELL: That means that -- that has two
11 impacts, Your Honor. It has a substantive impact on
12 liability, but also a temporal impact, because suddenly that
13 period of damages is wiped out because the license is
14 restored. So it is an important, you know, effect and not
15 anything that I necessarily have to go back and improve. I
16 think it's just the opposite. I think the most likely outcome
17 is either I'm going to lose, or I'm going to win and the
18 license is restored and all of the work we're doing here is
19 for naught.

20 THE COURT: Well, the problem is it's all based on
21 what you think might happen. We just don't know.

22 MR. CORDELL: Well, that's true. But in these cases
23 the *Landis* factors counsel that we are to allow the sister
24 court to proceed to judgment and then we can proceed, you
25 know, in a rational and orderly basis.

1 THE COURT: What else do you want to tell me?

2 MR. CORDELL: So as to the IPRs we moved very
3 quickly to get these IPRs on file.

4 Can I have slide 32?

5 We filed our IPRs on two of the patents before answering
6 the complaint, and then within two weeks of receiving
7 infringement contentions on the two others. They waited three
8 and a half months to assert the last two patents, and then
9 we -- well, no, I'm sorry. They waited five and a half months
10 to assert the last two patents, and we moved within three and
11 a half months of getting those for the first time. So we
12 moved very expeditiously.

13 And the notion that Netlist is going to ask for an
14 injunction doesn't really hold up because they didn't even
15 put it in their complaint. Their complaint doesn't request
16 injunctive relief. There's no prayer for injunctions. It's
17 -- this is simply not an injunction case. And even if they
18 had, it is not true that they haven't licensed these patents;
19 they licensed them to us. I took you through Section 8 of the
20 JDLA. And the reality is that -- I think Mr. Sheasby was
21 correct. I wouldn't have characterized it with the word
22 'jaundiced', but I think that is correct that injunctions are
23 rarely granted today in patent cases.

24 Thank you.

25 THE COURT: Well, that's probably more the result of

1 the Supreme Court's eBay decision than any particular court's
2 jaundice or lack of jaundice. But anyway, I think it's a fair
3 characterization of the landscape.

4 All right. Thank you.

5 MR. CORDELL: Thank you, Your Honor.

6 THE COURT: All right. Let's take up next Document
7 121, which is the Plaintiff's motion to compel the deposition
8 of J.B. Lee.

9 Let me hear from Netlist on this. I think I understand
10 most of the background here, Mr. Sheasby, who this gentleman
11 is, what his role was previously, what his role is now as the
12 president and general manager of the Samsung memory business.

13 MR. SHEASBY: So let me then just update you on the
14 sort of the bidding and the ask, is the central problem that
15 we have is this is an individual who was on a series of emails
16 and correspondence in which he's the only person who's been
17 designated as having knowledge regarding these particular
18 issues.

19 So, in particular, there was an exchange of term
20 sheets--this is an agreement that was never reached between
21 the parties--in which he is alone on it. And there is -- if
22 you see on the right-hand corner, it talks about using an NRE
23 as a way to cast payments that would otherwise be described as
24 royalty payments. And this document is actually an area of
25 central dispute. The dispute is that Netlist witnesses have

1 testified that this was J.B. Lee's request to have the
2 agreement structured this way. Samsung obviously vigorously
3 disputes that. And so what we offered to them is, If you're
4 not going to let us examine J.B. Lee on documents where he has
5 unique knowledge, then you shouldn't be able to use the
6 documents and introduce them into evidence and use them
7 against us.

8 And this is one example of it, and then the other central
9 example of it is I think a very, very important one. This is
10 an email exchange between --

11 THE COURT: Well, let me just say this. I'm not
12 going to consider a rule on what's going to be admissible and
13 what's not going to be admissible at trial today. I'm
14 interested in deciding whether this individual is going to be
15 shielded or not shielded from deposition. And whatever the
16 answer to that is, I'll take up whatever the impact that might
17 be on exhibits later. But tell me why he should not be
18 shielded under the apex doctrine. And am I correct that the
19 Central District of California did shield him even though he
20 was a mere vice president at the time?

21 MR. SHEASBY: They shielded him, but it was a
22 magistrate decision that was with leave to approach, and we
23 ultimately did not need him for that case. In this issue
24 there are these two central issues.

25 And I want to come back to it. This document they are

1 going use to say that we told Samsung pay us an NRE and it
2 will be used -- it will be a surreptitious royalty. I know
3 this because they talked about it to our CEO for about an
4 hour.

5 The person who received this document, the only person
6 who received this document was J.B. Lee, and the idea that
7 they're going to get to put this document in front of a jury
8 and tell them a story about Samsung -- about Netlist acting
9 surreptitiously or suggesting something surreptitious to
10 Netlist, if we can't examine the only recipient of this
11 document, that goes beyond sort of the apex doctrine and
12 inconveniencing the witness; that goes to a due process issue.
13 And their only response to that is, You can depose someone
14 named Hyun Ki Ji. Hyun Ki Ji was already disposed in the
15 Central District of California case. He denied having any
16 knowledge of this whatsoever.

17 And so the reason why I brought this up about
18 admissibility is to show that we've been operating in good
19 faith. We said, Listen, if you're not going to let the guy be
20 deposed, you shouldn't be able to use the document that he's
21 the unique recipient of, and they declined that offer. And so
22 from a due process standpoint it cannot be both ways. If a
23 document which he's sole recipient of that they've told us
24 will be a central aspect of this case is going to be used, he
25 needs to be examined on it.

1 THE COURT: Are you telling me that this document is
2 the only matter he needs to be examined on?

3 MR. SHEASBY: It's this document, and I'll show you
4 the other one, Your Honor.

5 THE COURT: Tell me this. I gather Mr. Lee is -- or
6 Doctor Lee is located in Korea?

7 MR. SHEASBY: Yes, Your Honor. We offered to do it
8 by Zoom.

9 THE COURT: Have you-all explored a Zoom or virtual
10 deposition? Have you talked about whether it needs to be one
11 hour or two hours, not six or seven hours? Have you-all tried
12 to find some accommodation back and forth where you both give
13 and take on this?

14 MR. SHEASBY: We did, Your Honor. I proposed Zoom
15 for no more than four hours.

16 THE COURT: Okay.

17 MR. SHEASBY: And this is the other email I want to
18 talk to you about. So there was actually someone above J.B.
19 Lee at the time. His name was J.S. Choi. And J.S. Choi asked
20 J.B. Lee to investigate the Samsung/Netlist relationship and
21 make sure there is no contamination. And then J.B. Lee says,
22 I will assess the situation. And we believe that this
23 contamination is about the potential for them to use our
24 technology in their products, and the reason why we think that
25 is the case is this is from 2016 of June. And earlier in that

1 year, J.B. Lee was the recipient of a number of products from
2 us that were sent for reverse engineering at Samsung. The
3 witnesses in this case deny having any knowledge, so we
4 deposed Indong Kim. He has no knowledge of what they did with
5 the products. The only person who has knowledge of what
6 occurred with the products is J.B. Lee.

7 THE COURT: So are you telling me that Doctor Lee
8 was a recipient on these, we'll say two emails, and he never
9 forwarded them to anybody else, nobody else ever discussed
10 them, that he is the sole and only human on the planet that
11 knows anything about that?

12 MR. SHEASBY: We have no answer to the question of
13 what was done with the DIMMs that they received from us. We
14 asked Indong Kim and he said, I don't know. We have no
15 evidence that this document was ever forwarded to anyone else
16 at Samsung. There is no record of it in the case of it being
17 forwarded to anyone else. In this email chain in which J.S.
18 Choi says, I will investigate -- I'm instructing you to
19 investigate what's going on, we have no evidence of what
20 happened. We spoke to Indong Kim about it, who is on the
21 email chain that I just showed about investigating
22 contamination. "Both J.S. Choi and my boss J.B. Lee are quite
23 concerned." Indong Kim testified that he has no recollection
24 of what that meant.

25 So it is not a situation in which there's anyone else.

1 This document in particular, we have seen no other forwarding
2 of this document to any other Samsung employee, and the
3 Samsung employee they put up on the subject who they say has
4 knowledge of this subject admitted under oath in his previous
5 deposition he has no recollection of it. And so --

6 THE COURT: Answer this for me. The Court has some
7 concern that if I open this Pandora's box, Doctor Lee is going
8 to tell you something you didn't know and then you're going to
9 come back to me and, Now that we know this we have to go
10 depose this person, and we have to go down this rabbit trail.
11 I mean, fact discovery's already closed, we have a trial day
12 in May --

13 MR. SHEASBY: Yes, Your Honor.

14 THE COURT: -- time is fast slipping away from us.
15 How can I be assured that this is not just the proverbial
16 genie getting out of the bottle if I give you some leave to
17 pursue some type of limited deposition here?

18 MR. SHEASBY: My daughters call it the give a mouse
19 a cookie problem.

20 THE COURT: Well, whoever calls it what, I think you
21 understand my question.

22 MR. SHEASBY: Yes. And the answer is that you just
23 have my word that it will begin and end here with this
24 deposition.

25 THE COURT: Okay. Let me hear from Samsung.

1 Mr. Cordell, in the briefing Mr. Sheasby tells me that
2 there are 233 different subsidiaries or divisions of Samsung
3 that have presidents, and President Lee is just one of 233
4 presidents within this global behemoth of a company, so he's
5 not the CEO and this is not an apex situation. What's your
6 response to that?

7 MR. CORDELL: Well, I think that Mr. Sheasby's
8 counting is a little off in that he's looking at a worldwide
9 conglomerate that involves subsidiaries that are in, you
10 know -- we heard earlier about I got confused between Samsung
11 Singapore and Samsung Shanghai. Those are much smaller
12 entities. What we have with Doctor Lee here is the fact that
13 he is the president and general manager of the entirety of the
14 Samsung memory business. It's an enormous business that
15 provide between -- I guess it's 40 percent of the DRAM
16 products and 30 percent of the NAND products, the EPROM
17 products worldwide for the entire planet. He's in charge of
18 over 30,000 employees. He has employees in 33 offices across
19 the world. It is really beyond question that he is an apex
20 witness.

21 THE COURT: What's your response to the argument
22 that as to these targeted emails he's the only person in the
23 world that knows about them?

24 MR. CORDELL: It's simply not true. It's simply not
25 true.

1 THE COURT: Then why haven't you put up somebody who
2 does know about them and who can be deposed on them?

3 MR. CORDELL: We did. So, for example --

4 Can I have slide 15?

5 We were talking about a Netlist meeting in April of 2015.
6 And there's some confusion between April 2015 and 2014, but
7 the fact is that the meeting that he was targeting here,
8 President Lee says in his declaration was attended by Indong
9 Kim. So the gentleman that they did depose that they decided
10 -- that they didn't ask any questions of about this specific
11 meeting, they had a chance to depose him, they did depose him,
12 and they simply didn't ask any questions. There is no
13 evidence, no evidence that President Lee is the only person
14 that knows anything about these documents; absolutely zero
15 evidence.

16 And if we can have slide --

17 THE COURT: You understand there could be a meeting
18 that Mr. Baxter and I both went to, and he paid very close
19 attention and I stared out the window, and then after the fact
20 I might remember nothing about it if deposed but he might
21 remember a great detail about it if he was deposed. Just
22 because there are more than one person that knows about these
23 emails, that's not a real strong indicator of who today
24 possesses the information the other side's entitled to learn
25 about and develop in discovery.

1 MR. CORDELL: That is true, Your Honor, but that's
2 why we have the apex doctrine, and the apex doctrine tells us
3 what we are to do in these cases. We are to exhaust
4 alternative sources of the information first, and if those
5 fail then we are to proceed to the apex witness. So we could
6 depose Mr. Baxter first before we ever approached Your Honor
7 to see what information he has, and that's exactly what --

8 THE COURT: So did I misunderstand Mr. Sheasby when
9 he told me that, We've deposed other people and they say they
10 don't know anything about this?

11 MR. CORDELL: I believe he is incorrect. I don't
12 think they have asked those questions. There are two
13 principal witnesses at play here. There's Mr. Indong Kim and
14 then there's Mr. Hyun Ki Ji.

15 THE COURT: Has Mr. Indong Kim been deposed on these
16 topics?

17 MR. CORDELL: He was deposed, and we designated him
18 as our 30(b)(6) witness on the key elements of the JDLA and
19 they didn't question him about these things.

20 With respect to EVPG, who is a very high-ranking official
21 within Samsung, very high ranking, we had arranged his
22 deposition, we flew him to the United States, he spent some
23 time in my office, and the day before his deposition, hours
24 before his deposition, we got a unilateral email from Netlist
25 canceling the deposition.

1 THE COURT: Wait a minute. Who is EVPG? Is that a
2 person?

3 MR. CORDELL: It's really -- it's confusing because
4 -- when I first heard it, I thought it was just a string of
5 initials. His last name is JI, but it's pronounced G. So
6 he's executive vice president Hyun Ki Ji.

7 And if I could have beginning at slide -- let me start at
8 slide 9.

9 THE COURT: So Mr. Kim, Indong Kim has been deposed.

10 MR. CORDELL: He was.

11 THE COURT: Mr. Ji was not deposed.

12 MR. CORDELL: He was not deposed. And they knew --
13 well, they knew quite directly that Mr. JI was directly
14 involved with the entirety of the facts that they're seeking
15 here. So we have --

16 THE COURT: Tell me why Mr. Ji was not deposed.

17 MR. CORDELL: Again, Your Honor, we brought him over
18 here. We flew him from Korea, a very busy man, a very
19 high-ranking official.

20 THE COURT: I heard that. Why wasn't he deposed?

21 MR. CORDELL: Because at roughly noon the day before
22 his deposition, we got an email from Netlist canceling the
23 deposition. Only they can explain to us why they chose not
24 to.

25 And there's no question that he was deeply involved, in

1 fact, I would argue central, to the entirety of what they have
2 shown Your Honor. So, for example, we have paragraph 7 of
3 President Lee's declaration where he says, I am a high-ranking
4 official. I don't do these things without a team. I always
5 involve my team. It was my practice to share any information
6 I received from Netlist, following any meetings or discussions
7 with other Samsung employees on the relevant teams. And
8 that's kind of what I expect. A man that is overseeing 30,000
9 employees and all of these operations doesn't operate solo; he
10 oversees things, he hears, he gives his opinions, but he is
11 not the prime mover on anything.

12 We have the deposition of Mr. Hong at slide 10 talking
13 about this meeting in 2014, this initial exchange of the
14 proposals. And Mr. Hong -- this is CEO of Netlist Mr. Hong.
15 Mr. Hong testifies that he visited Samsung and met with the
16 president of the memory business unit as well as Jung Bae
17 Lee--that is President Lee--and Hyun Ki Ji. So EVPG was in
18 that meeting and a whole bunch of other executives, but the
19 CEO of Netlist recalls Mr. Ji being there, EVPG being in the
20 meeting, and yet they chose not to depose him.

21 We have lots and lots of evidence that Mr. Ji was central
22 to the whole thing. At slide 11.

23 THE COURT: Have you offered to put up Mr. Ji again,
24 notwithstanding their earlier cancellation of the deposition?

25 MR. CORDELL: What -- we did talk about that and

1 what we were told is that they're not interested; they know
2 what he's going to say and they're not interested in what he
3 has to say. So I -- we would be happy to substitute. I mean,
4 again, it's a little intrusive because we did haul him over
5 here, but if that resolves the problem then I'm sure we could
6 do that.

7 THE COURT: Tell me why Doctor Lee, as busy and as
8 important as he is, can't take two hours to sit in front of a
9 computer screen with a camera and be remotely deposed for two
10 hours out of one day on this topic.

11 MR. CORDELL: It is very difficult, Your Honor,
12 because we -- he's a high ranking official, he certainly will
13 do things --

14 THE COURT: My question assumes all those facts.

15 MR. CORDELL: But my point is that he's very careful
16 about sworn testimony. We will have to prepare him
17 extensively. We will have to involve a number of his
18 subordinates. It's a herculean effort I guess is the way I
19 would put it.

20 So if we can find a way to get that information through
21 another source, that is what the apex doctrine tells us over
22 and over again that that's how we are to obtain this
23 information.

24 If -- you know, if EVPG could sit for a deposition, I
25 think that would be a way out of the box. We could answer an

1 interrogatory. They didn't give us an interrogatory on this,
2 for example. That would be an alternative source of
3 information to obtain what it is that they're interested in.
4 But burdening this apex executive is the last resort and not
5 the first resort.

6 And if Your Honor can just briefly indulge me, at slide
7 11 we have Mr. Ji sending the term sheet for the
8 Netlist/Samsung agreement. We have -- I'm sorry. That was
9 from Jibum Kim, who is a Netlist employee sending it to
10 Samsung, and he sends it to a variety of people but including
11 Mr. Ji.

12 At slide 12 we have an exchange between Samsung and
13 Netlist, but again Mr. Ji, EVPG, is copied again.

14 At slide 13 we have the same situation coming back from
15 Netlist and Jibum Kim of Netlist addresses Mr. Ji.

16 Over and over and over again we see that Mr. Ji was
17 central to these facts, would have the information that
18 presumably Netlist wants or needs, and yet they chose not to
19 depose him.

20 At slide 14 we reproduced the email, Your Honor. You can
21 see when it was that they called off the deposition. And I
22 believe that I -- I'm not sure whether 12:51 p.m. was central
23 or eastern time, but I recall it being in the afternoon when
24 we got the email canceling the deposition.

25 THE COURT: All right. I'd like to ask a couple of

1 questions of Mr. Sheasby.

2 MR. CORDELL: Okay.

3 THE COURT: Mr. Sheasby, I want to know why you
4 didn't depose Mr. Ji. And Mr. Cordell tells me you -- there
5 was some indication that you didn't depose him because, quote,
6 you already knew what he was going to say. Did you know what
7 he was going to say? And if so, how in the world did you know
8 what he was going to say, and why did you not depose him?

9 MR. SHEASBY: I don't think this was intentional on
10 Mr. Cordell's part, which is he was deposed in the Central
11 District of California case and asked this exact topic about
12 this April 2015 meeting, which is the meeting we care about,
13 and this relates to this controversial term sheet. It says
14 April 2014, but that's a typo. It was April 2015. This is
15 the document, this controversial term sheet --

16 THE COURT: Go back to his deposition from the
17 Central District of California. Show me what he was asked and
18 what he said about --

19 MR. SHEASBY: "Do you recognize an email chain from
20 April 13" --

21 THE COURT: Can you enlarge that so I can read it on
22 the screen?

23 MR. SHEASBY: Yes, sir. It starts on page 27 and
24 goes over to page 28.

25 THE COURT: What line on page 27?

1 MR. SHEASBY: 27, line 7.

2 THE COURT: All right.

3 MR. SHEASBY: And I can move to page 28 when you're
4 ready, Your Honor.

5 THE COURT: Can you show me the top of 28 so I can
6 follow the dialogue?

7 MR. SHEASBY: And then we asked Mr. Indong Kim,
8 who's the person who's referenced in J.B. Lee's declaration,
9 whether he was involved in the negotiation at all, and he
10 denied it, that he was involved in any decision-making that
11 led to the negotiation. This is Indong Kim, the other person
12 they reference.

13 And so there's --

14 THE COURT: Is this a transcript of testimony or is
15 this a deposition?

16 MR. SHEASBY: This is a deposition, Your Honor.

17 THE COURT: This was taken in the California case?

18 MR. SHEASBY: No, it was taken in this case, Your
19 Honor.

20 THE COURT: Okay. What of what you have on the
21 screen are you pointing out is relevant to this issue?

22 MR. SHEASBY: The highlighting, "Were you involved
23 in the decision-making that led to the execution of the joint
24 development agreement?" That's the agreement that ultimately
25 came out of all these term sheets that they intend to use at

1 trial.

2 And he said, "No. I was the person executing the joint
3 agreement."

4 "How do you know about the involvement?"

5 And he said, "I heard afterwards." So it's just hearsay.
6 So he's --

7 THE COURT: So his answer was, "No, I wasn't
8 involved; I just signed the document"?

9 MR. SHEASBY: By executing the joint development
10 agreement, he doesn't mean signing the joint development
11 agreement; he means participating in the joint development
12 after it was executed. So it's a translation. It's from
13 Korean to English. So he did not sign the agreement.

14 To be clear, we're not asking for J.B. Lee because he
15 signed the agreement; we're asking for J.B. Lee because they
16 intend to make this exhibit front and center in the trial,
17 and the person who received it was J.B. Lee. The person who
18 requested it was J.B. Lee, and the person they're pointing to,
19 Hyun Ki Ji, testified he had no recollection or memory of this
20 conversation, and Indong Kim testified he had no recollection
21 or memory of this subject.

22 And it's the same way with this, with them talking about
23 -- same way with this talking about no contamination between
24 Samsung and Netlist after receiving our products -- after J.B.
25 Lee received our products in about -- investigating what was

1 going on. There's no other person who has any knowledge of
2 that, and Indong Kim denied having any knowledge of that. "I
3 will assess the situation."

4 So now he's a really important person. At the time he
5 was a subordinate of someone else, and he was intimately
6 involved in this process when he was subordinate. So I don't
7 know what to do.

8 So going back to this, which is to say that I will be
9 very --

10 THE COURT: Let me ask you this. Who was his
11 superior at the time?

12 MR. SHEASBY: J.S. Choi.

13 THE COURT: And what's the status of Mr. Choi today?

14 MR. SHEASBY: He's very high up as well. He's just
15 not as high up as J.B. Lee.

16 THE COURT: So there's been no discussion of taking
17 Mr. Choi's deposition.

18 MR. SHEASBY: There hasn't, and the reason for that
19 is because Mr. Choi was not involved in the negotiation in --
20 it's indisputable that Mr. Choi was not involved in the
21 negotiation in 2004. This was -- there's two separate issues.
22 There's a instruction in April of 2015 where J.B. Lee did it
23 on his own with J.B. Kim, and Mr. Ji has no recollection of
24 it. And then there's -- after the agreement has been signed,
25 there's this relationship in which they receive our products

1 and they talk about contamination.

2 J.S. Choi was the head of sales at that time. SVP Lee
3 was the head of planning, which is sort of the design and
4 development arm of Samsung Memory, and he received our
5 products and then something was done with them and that led
6 to this communication regarding contamination.

7 So it was -- it was not trying to be -- you know, I think
8 sometimes people do this and they just do it to be vexatious
9 or opportunistic about it, and that's why I was saying -- we
10 asked them, Just tell us you're not going to use this document
11 and then he no longer becomes a person with unique knowledge.
12 And they said, No, we want to use this document against you,
13 but we're going to block the examination of the sole recipient
14 of this document. And from a due process standpoint that's
15 just not the way it works.

16 And so I brought that up not for you to rule on an
17 evidentiary issue, but to emphasize that this is not me being
18 vexatious; that there was a serious due process issue here.
19 Doctor Ji testified under oath he doesn't have a recollection
20 of this April 2014 time period. Indong Kim testified he was
21 not involved in the negotiation. The nexus and the source is
22 him.

23 And I will note that that declaration that says Indong
24 Kim was involved in the meeting is inconsistent with Indong
25 Kim's own testimony, which was that he was not involved. And

1 so that, in my mind, calls into question the precision of that
2 declaration. I don't think J.B. Lee is making things up; I
3 just -- it's clear that I'm not sure he even knows what was
4 going on. And I think if he was shown documents, there would
5 be a potential to refresh his recollection.

6 So this in particular is a huge problem for me if I don't
7 get to depose this witness.

8 THE COURT: I hear you.

9 MR. SHEASBY: Thank you, Your Honor.

10 THE COURT: Mr. Cordell, does Doctor Lee speak
11 fluent English, or if he were deposed, hypothetically,
12 would this have to be through a translator?

13 MR. CORDELL: I believe so, yes, Your Honor.

14 THE COURT: You believe so what?

15 MR. CORDELL: I believe he would require a
16 translator.

17 THE COURT: Okay.

18 MR. CORDELL: If I could just address Mr. Sheasby's
19 arguments.

20 So we've heard a lot about the -- this term sheet, which
21 is misdated. Instead of April 2014, it's really 2015. There
22 is no question, there is no question that the meeting here
23 that he's referencing was attended by Indong Kim. There's no
24 question about that.

25 THE COURT: But Mr. Kim doesn't say he remembers

1 anything about it.

2 MR. CORDELL: If you study the testimony that
3 Mr. Sheasby just showed us, that's not what he said. He
4 said he didn't have a decision -- I'm paraphrasing. He did
5 not reach the decision to sign the agreement. He was not part
6 of that decision-making process. It says nothing about
7 whether or not he attended this meeting. So we have to be
8 really precise about the statements that we're quoting and
9 make sure that they line up with the issues that are being
10 prosecuted.

11 They did not ask Indong Kim anything, anything about this
12 term sheet. They did not depose -- the testimony we saw from
13 Mr. Ji had to do with his recollection of who attended the
14 meeting. If you -- again, if you read the testimony very
15 precisely, he didn't say anything about this term sheet. They
16 didn't put this term sheet in front of him.

17 THE COURT: How are you supposed to have a
18 recollection of a term sheet that was developed in a meeting
19 you say you don't remember anything about?

20 MR. CORDELL: Because when you see the term sheet,
21 it may refresh your recollection. And we didn't get that
22 opportunity because they didn't do it in the CDCAL case
23 because it wasn't an issue, and then they decided not to
24 depose him in this case. And the apex doctrine tells us we're
25 supposed to exhaust these other avenues. They should have

1 deposed EVPG, who is a very high official, and they chose not
2 to. They should have shown him this document that Mr. Sheasby
3 tells us is critical that he must have examination on, and yet
4 he chose not to. They didn't show it to Indong Kim and ask
5 him what his recollections were or what the background was.
6 What I understand Mr. Sheasby is interested in is the context
7 of this term sheet.

8 So this is really a problem of their own making. Had
9 they deposed EVPG, at least it's my opinion that they would
10 have been more than satisfied with the information he could
11 have provided. I did spend some time with him and he seemed
12 very knowledgeable. Again, I didn't -- I don't recall whether
13 we covered this exact document or not, but he is a very
14 capable fellow and they should have deposed him.

15 THE COURT: Maybe I'm confused, and that's certainly
16 a possibility, but didn't I just hear from opposing counsel
17 that in the Central District of California litigation that
18 Mr. Ji was deposed and didn't really have any knowledge of
19 these events?

20 MR. CORDELL: He was deposed, Your Honor, but --
21 maybe the testimony is still here. We have to be very precise
22 about what it is that he said.

23 THE COURT: Well, it's been a while since I took a
24 deposition, but as I recall if you start out with a high-level
25 Were you at this meeting and do you have any recollection and

1 the answer is no, it's not unreasonable to stop there. What
2 you're telling me is they should have put term sheets from a
3 meeting in front of him after he said he didn't remember being
4 there and ask him about the terms of the term sheet, and that
5 that was a failure to fully exhaust their pre-apex remedies.
6 I don't know that it's unreasonable to not go further when the
7 witness doesn't profess any recollection of the meeting or
8 events that lead up to the term sheet that's the focus of it.

9 MR. CORDELL: Let me just make sure we're really
10 precise about the testimony here, Your Honor, because this
11 is obviously very important. So this is the testimony
12 that --

13 THE COURT: I read all that.

14 MR. CORDELL: Mr. Sheasby showed us, "Did you attend
15 such a call or meeting with Mr. Kim of Netlist in or around
16 this time?"

17 Answer: "I don't recall for sure. However, I think I
18 probably did."

19 Now, a good lawyer would probably want to explore that.

20 Question: "If you recall, who else attended that meeting
21 with you?"

22 Answer: "I don't really recall."

23 "Do you recall whether this meeting was in person or by
24 video conference or telephone or in some other fashion?"

25 Answer: "I don't really remember. However, it was not a

1 video conferencing, so I think probably face-to-face."

2 THE COURT: Next question, "Do you remember anything
3 about what was discussed?"

4 "No, I don't remember."

5 MR. CORDELL: But the point is he did have a
6 recollection of the meeting, and it would have been more
7 than reasonable, then, to show him this document that
8 Mr. Sheasby says is critical and find out, because we just
9 don't know?

10 THE COURT: Okay. Anything further on this?

11 MR. CORDELL: Only that we're happy to explore other
12 avenues, Your Honor. Again --

13 THE COURT: You-all had three hours this morning to
14 explore more avenues and you brought me this as an impasse
15 issue you couldn't resolve, so I gather the exploration
16 process has run its course.

17 MR. CORDELL: It has. But again, the burden under
18 the apex doctrine is for us to explore whatever avenues are
19 available. And if Mr. Sheasby is so critically worried about
20 the background of this document, that seems appropriate for a
21 well-targeted interrogatory or set of questions that could
22 solve whatever problems he has.

23 THE COURT: Okay. Thank you, counsel.

24 All right. I next want to move on and take up Document
25 126 and 130. I think these go hand in glove and there's no

1 reason not to argue them concurrently. This is the opposed
2 motion to strike Netlist's late disclosure of Netlist products
3 as well as the motion for leave to amend infringement
4 contentions.

5 It seems to me the gravamen of these two matters is
6 Samsung's complaints about not being given adequate notice or
7 the other party not complying adequately with the Court's
8 local rules on disclosures, so I think the appropriate place
9 to start is with Samsung, and I'll hear from Samsung first on
10 these.

11 DR. ALBERT: Thank you, Your Honor. Frank Albert
12 for Samsung.

13 We're actually not going to use these slides. Thank you.
14 So the issue here, Your Honor, is whether it's reasonable
15 for Netlist to disclose at the end of fact discovery embodying
16 products, conception reduction to practice documents,
17 disclosures to third parties that the local rules require that
18 they disclose before discovery even begins. Your Honor is
19 well aware of the local rules, I don't need to rehash them
20 here, but we're relying on three provisions of Local Rule 3-1
21 and 3-2, 3-1(f) requires that if a party like Netlist wants to
22 preserve the right to rely on the assertion that its own
23 products practice any of the asserted claims for any purpose,
24 then it must disclose that at the beginning of the case and at
25 the infringement contention stage.

1 Similarly, Local Rule 3-2 requires that they -- Netlist
2 disclose the conception reduction practice documents for its
3 asserted patents. 3-2 also requires that Netlist disclose
4 documents evidencing disclosures to third parties, so the
5 subject matter of the patents of the invention, before the
6 application for the patents at issue here. Netlist did none
7 of that. Instead, it waited until the end of discovery to
8 disclose tens of thousands of pages of documents regarding
9 these issues, as well as an allegation that six of their
10 products practice the asserted patents.

11 And the facts here, Your Honor, are pretty telling.
12 Here you have a case that was filed December of 2021. They
13 chose this forum. Counsel for Netlist described earlier about
14 the dispute the parties had about whether this case should be
15 in Delaware or here in East Texas. We are here after that
16 motion had been resolved. They chose this forum. They knew
17 what the rules are.

18 We got their infringement contentions in May of 2022.
19 That's six months later. And we didn't have a statement of
20 what the embodiment products were. There was -- the only
21 conception and reduction to practice documents at that time
22 that were produced were the file histories for these patents.
23 So none of the internal documents that you would normally see
24 evidencing conception and reduction to practice, none of that
25 was produced in this case.

1 Another big category of documents that wasn't produced in
2 this case six months after it was filed were documents,
3 disclosures to third parties. Now, the reason why these are
4 important, as Your Honor well knows, is these rules are meant
5 to front-load disputes. The Defendant is meant to get an idea
6 of conception and reduction to practice disclosures to third
7 parties so we can use the discovery period to figure out what
8 Plaintiff's claims are, whether there were others involved,
9 how that would affect invalidity contentions, how that would
10 affect claim construction, whether there's issues of joint
11 ownership, whether there's issues of the scope of the claims,
12 whether, you know, particular Netlist employees needed to be
13 deposed to figure out the basis for these claims. We weren't
14 given any of that opportunity.

15 In fact, not only were we not given these documents and
16 these disclosures at the initial disclosure phase, the
17 infringement contention phrase, we weren't even alerted that
18 there might be an issue that they were somehow searching for
19 these kind of documents, they couldn't find them, and would be
20 coming later.

21 In fact, when the parties negotiated a schedule in June
22 of 2022, Samsung sought a 90-day extended schedule because of
23 the addition of the two new patents that Mr. Cordell discussed
24 earlier today. Netlist denied that request, pushed for the
25 schedule as it currently exists, and then proceeded through

1 discovery.

2 We served interrogatories in June asking for the very
3 things that should have been produced and disclosed with the
4 initial infringement contentions on conception, another ROG on
5 embodying products, another ROG on disclosures to third
6 parties.

7 Fast forward from June to September. September was a
8 substantial completion of document production. We didn't get
9 any of these documents at that time. Fast forward to, you
10 know, October, Samsung asks again, Netlist, are your materials
11 complete; no real response at that time.

12 Finally, finally we get to November. November 15th
13 Netlist produced over 30,000 pages of documents. Didn't tell
14 us what was in it until November 22nd. That's when they
15 amended their ROG response--not their infringement
16 contentions, but their ROG response--to now point to an
17 allegation that some of their products embody some of the
18 claims; also pointing to numerous documents for conception and
19 reduction to practice, numerous documents that were allegedly
20 showing that Netlist had disclosed certain subject matter of
21 their patents to third parties. This is, again, one month
22 before the end of fact discovery, five months after local
23 rules require it to be disclosed, and 11 months into the case.

24 We immediately, immediately went to Netlist, asked them,
25 Withdraw these claims, it's far too late, far too prejudicial.

1 Netlist ignored that request, didn't substantively respond
2 until we met and conferred on our motion here the last day of
3 discovery.

4 Now, what does Netlist say in response? Well, the
5 documents took a long time to find. It was a big effort, and
6 there are a few things that are problematic there. And here
7 this goes to the issue of diligence, which Your Honor knows is
8 one of the factors the Court considers when considering
9 whether an amendment is appropriate. Here Netlist says, well,
10 the documents took a long time to find. The problem here is
11 they didn't tell the Court or us when they started, what the
12 effort was. All they provided was vague details that one
13 person was looking for them, and didn't tell us when that
14 person started, how much that person spent doing this.

15 But more so, Your Honor, even if they were looking for
16 these documents the whole time, this entire period prejudice
17 is compounding on the side of Samsung because we are being
18 deprived of an opportunity to investigate Netlist's claims.
19 They never raised this to us. They never told us, We have
20 found a source of documents, we have identified that there may
21 be embodying products, we need more time to disclose that,
22 let's work out a schedule to do that. They didn't do any of
23 that.

24 And, in fact, if you would think about how this process
25 would go, they have disclosed six supposedly embodying

1 products for patents, conception and reduction to practice
2 documents for six patents, disclosures to third parties for
3 six patents. To the extent this investigation was ongoing,
4 you wouldn't expect it to be completed in a day or two; you
5 would expect that you would get some documents identified,
6 some theories identified at one point, and then maybe a day or
7 two later, a week later, a month later you would identify
8 something else.

9 But what did they do? They waited to do this
10 investigation, identify the documents, go to an expert to
11 analyze the documents, and disclose everything, everything all
12 at once to Samsung. It didn't disclose the first product when
13 it discovered that it may have a belief that it practiced a
14 claim. It didn't disclose the conception documents early on
15 for one product or one patent when it was discovered. They
16 dumped this entire thing on us in November at the very end.

17 If they were really trying to cooperate, Your Honor, what
18 they would have done is they would have produced this
19 material, updated their contentions as soon as each piece of
20 information was found, and they didn't do that.

21 So with that, Your Honor, I will pass the argument.

22 THE COURT: All right. Let me hear from Netlist,
23 please.

24 MR. SHEASBY: May I have the elmo, Madam Courtroom
25 Deputy?

1 Netlist is a bit of a unique company in how it's
2 structured. Netlist doesn't have any central repository for
3 conception reduction to practice documents. The reason for
4 that is that patents are written after the products are
5 designed.

6 There is a declaration in the record from Jayson Sohi.
7 He is a Netlist employee who was involved in the second phase
8 of the production, and he talks about the fact that we don't
9 have organized conception and reduction to practice files; all
10 we have a electronic design files, and there are over 600 --
11 900 of those electronic design files that had to be analyzed
12 to identify the products.

13 I actually don't begrudge anything that Samsung said,
14 which is that if there was a prejudice for -- if this was
15 done in a lazy fashion and without diligence, there should be
16 consequences associated with that. I was involved in this
17 document collection and production. It was one of the most
18 complex collection processes I've ever been involved in. It
19 literally involved having to open up design files, which
20 should have numbers on them, to find graphs and diagrams to
21 see if they had certain embodying features.

22 I want to correct three things. There is no documents
23 that we are producing for -- before the filing dates of the
24 patents that disclosed the invention, that's a new argument.
25 That's never been raised before, and, in fact, it's incorrect.

1 The second issue is that we are not saying any of our
2 product designs actually practice the patents-in-suit. The
3 reason for that is two-fold. One is the product designs
4 stopped being sold or were never sold before the patents even
5 issued. The second reason is that the product designs are in
6 most cases not complete; they just embody certain features
7 that reflect the conception and reduction to practice. So we
8 do not intend to say, Oh, these products practice the patents
9 and, therefore, they're commercially successful. That's --
10 it's not there. It's not in evidence.

11 What we say in our interrogatory response is very precise
12 that they reflect certain of the embodiments that are
13 described in the specification, not that they reflect the
14 claims themselves.

15 The third thing is that I have done everything humanly
16 possible to sort of try to alleviate any prejudice that
17 existed. It is correct that they didn't receive the documents
18 until November 15th. We did involve an expert to analyze
19 them. We did that intentionally so there wouldn't be a dump,
20 and on November 21st they would get the precise lists of
21 documents in a very detailed interrogatory response that had
22 the information.

23 We have unilaterally told them that if they need to file
24 another expert report on this subject, they may do so. We
25 have unilaterally told them if there is third-party discovery

1 that they need, they can take it. They haven't identified
2 anything. We've said, If you need to recall one of our
3 witnesses to take this information, you can do so.

4 We recognize that these products, this information was
5 not available in May. It was not intentional for it not to be
6 made available. There was a good faith very, very complex
7 process to identify these documents.

8 To be very clear, there are no prefiling disclosure
9 documents that we're relying on. We're not saying any of
10 these products actually practice the patents because they
11 existed before the patents and they just involve certain
12 features that are described in the patents. And we are
13 prepared to give them whatever they need in terms of
14 additional time and additional deposition if they need
15 something.

16 They've asked for a four-month continuance of the case,
17 but if you do the math, we gave them the information November
18 21st. Four months later would be April of 2023, and if they
19 need that amount of time to run these things to ground they
20 can. I will note that they don't identify anything concretely
21 that they needed or would have done or would have changed.

22 This is not a situation in which I think they are bad or
23 that this is opportunistic. This is a principled complaint
24 they make, and we are prepared to do everything we can to
25 remedy it. But we do think there was good faith. I think

1 Mr. Sohi's declaration establishes that. And if they want to
2 retake a deposition, if they need additional time for an
3 expert report, they can have that.

4 Thank you, Your Honor.

5 THE COURT: All right.

6 Anything further from Samsung?

7 DR. ALBERT: Yes, Your Honor.

8 Just to correct the record, there -- as we identified in
9 our briefing, there were disclosures to third parties that
10 were identified in the interrogatory responses. We identified
11 I believe 10 or 11 third parties that Netlist claimed in their
12 interrogatory responses that they disclosed subject matter of
13 the invention to. And this goes to our fundamental prejudice.

14 We got notice of this, instead of at the beginning before
15 fact discovery began, at the very end. And now their proposed
16 remedy is that we would, at the time we are readying for a
17 very busy trial, to run a whole nother discovery period on top
18 of trial prep, burdening Your Honor with additional motion
19 practice that's going to come forward, additional invalidity
20 contentions, potentially different additional claim
21 construction disputes based on their claims, and they still
22 haven't said why they didn't start this or finish it before
23 their infringement contentions.

24 So we have significant prejudice. Their proposed remedy
25 doesn't address that prejudice. It's fundamentally unfair for

1 Netlist to be able to freely prepare for trial while we're
2 busy investigating the claims that should have been provided
3 and the documents that should have been provided at the --
4 before discovery even began.

5 And the notion that counsel has bent over backwards to
6 provide us this information, we just don't see it, Your Honor,
7 because if there was a concern about providing this
8 information late, then they would have alerted us to this
9 issue day one, when they discovered that there was a potential
10 trove of conception and reduction to practice documents; or
11 barring that, they wouldn't have waited until November 15th to
12 produce 30,000 documents at once; they would have produced the
13 documents along the way as they found them.

14 THE COURT: I've heard this, Doctor Albert. I think
15 I've heard all I need to on this.

16 DR. ALBERT: Thank you, Your Honor.

17 THE COURT: Thank you.

18 All right, counsel. It appears that I've now heard
19 argument on all these unresolved matters. I've noted your
20 resolutions and resolved motions in the record earlier. I
21 want to give you the Court's rulings on these unresolved
22 issues which should then complete all these matters being
23 covered one way or the other.

24 With regard to Samsung's motion to stay pending the IPR
25 review and the appeal pending before the Ninth Circuit

1 regarding the trial in the Central District of California,
2 Document 74, I'm going to deny that motion.

3 With regard to the motion for leave to supplement, I'm
4 going to deny that as moot given my ruling on the underlying
5 motion to stay.

6 With regard to the opposed motion to compel the
7 deposition of Dr. J.B. Lee, I'm persuaded that there has been
8 a good faith effort to exhaust the underlying sources prior to
9 reaching to depose Doctor Lee. I am going to order Doctor Lee
10 to sit for a remote deposition within the next two weeks to be
11 videoed, to not exceed two hours, including the time consumed
12 by the interpreter--it's not two hours excluding the
13 interpreter time--to focus on these April of 2015 matters that
14 were raised before the Court today. But I'm going to order an
15 up to two-hour deposition remotely of him to address these.

16 With regard to the motion to supplement infringement
17 contentions and the opposing motion to strike these
18 late-produced products purportedly practicing the patents and
19 the late disclosure on the Plaintiff's conception and
20 reduction to practice matters, those are Documents 126 and
21 130, I'm going to grant the motion to strike. I think that it
22 is too late in mid-December with the discovery, fact discovery
23 closing on the 22nd of December, to bring in 30,000 documents.
24 I understand the argument that Nexflix's [sic] system is
25 somewhat unconventional and it was burdensome and took a long

1 time to discover all of this, but at the end of the day
2 Netflix chose this Court, it chose this Court knowing this
3 Court's local rules, it could have anticipated those local
4 rules and begun the production process earlier than it did.
5 But at the end of the day, a delivery of the documents and
6 materials pursuant to discovery in mid-November with discovery
7 closing in the middle of December and the intervening holidays
8 is just not reasonable, and it's not practical for Samsung to
9 recover from that.

10 I noted Mr. Sheasby's offers repeatedly in argument, If
11 they need this they can have it, and if they want that they
12 can have it. The Court sets the schedule for this case.
13 Counsel doesn't offer what it will and won't do after the
14 close of discovery.

15 I'm going to grant the motion to strike and I'm going to
16 deny the motion to amend the infringement contentions.

17 And that should resolve all the matters that were not
18 able to be worked out by counsel today, and it should clear
19 the decks, so-to-speak, on this accumulated group of motions.
20 And hopefully, it is the Court's hope, that this resolution
21 both by agreement and by argument before the Court today will
22 put this case back on a posture that will allow it to move
23 forward for its current setting next spring and the trial can
24 take place as currently scheduled.

25 All right. Is there anything that was set for today that

1 either party's aware of that we did not take up or otherwise
2 resolve?

3 MR. SHEASBY: No, Your Honor. Nothing for
4 Plaintiffs, Your Honor.

5 MR. CORDELL: Nothing for Defense, Your Honor.

6 THE COURT: All right. That will be the Court's
7 order. That completes today's hearing. You're excused,
8 counsel.

9 And the Court stands in recess.

10 (End of hearing.)

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I HEREBY CERTIFY THAT THE FOREGOING IS A
CORRECT TRANSCRIPT FROM THE RECORD OF
PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.
I FURTHER CERTIFY THAT THE TRANSCRIPT FEES
FORMAT COMPLY WITH THOSE PRESCRIBED BY THE
COURT AND THE JUDICIAL CONFERENCE OF THE
UNITED STATES.

S/Shawn McRoberts 01/21/2023

DATE
SHAWN McROBERTS, RMR, CRR
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